

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JASON J. DUDA

Claimant

VS.

WICHITA THUNDER

Respondent

AND

ACE AMERICAN INSURANCE CO.

Insurance Carrier

Docket No. 1,056,927

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the April 16, 2013, Award entered by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on July 26, 2013. Lawrence M. Gurney of Wichita, Kansas, appeared for claimant. Alexander B. Mitchell of Wichita, Kansas, appeared for respondent.

The ALJ found claimant sustained upper extremity injuries through a series of repetitive accidents arising out of and in the course of his employment with respondent each and every working day through November 2008. The ALJ also found claimant suffered a 10 percent impairment of function to the body as a whole for a back injury sustained in November 2008; therefore, claimant has a combined permanent impairment of function to the body as a whole of 24 percent and is entitled to all outstanding medical and unauthorized medical up to the statutory limit. The ALJ granted consideration of future medical upon proper application.

The Board has considered the record and adopted the stipulations listed in the Award. In its Brief to the Board dated May 9, 2013, respondent denied the Award's Stipulation No. 2 in which "the date of the alleged accident is October 14, 2001, and each

and every working date until approximately November 23, 2008.”¹ Further, respondent denied claimant suffered injuries from October 14, 2001, and each day thereafter.

ISSUES

The respondent argues claimant's upper extremity claims are time-barred under K.S.A. 44-534(b) as more than three years have lapsed from the date of these accidents and more than two years have lapsed since the date of last payment of compensation for these accidents prior to claimant filing an application for hearing.

Claimant contends the ALJ's Award should be affirmed, as claimant suffered a series of frequent and progressive injuries to his upper extremities throughout his playing career.

The sole issue for the Board's review is: Are claimant's upper extremity injuries barred under K.S.A. 44-534(b)?

FINDINGS OF FACT

Claimant began his employment as a professional hockey player for respondent in December of 1996. The hockey season consisted of 64 to 72 games over a five and one-half to six month period. Claimant played his entire career with respondent. In 2010 claimant accepted a position with the organization as an assistant coach, with occasional duties in the front office.

Over the course of his active playing career, claimant sustained multiple injuries. Dr. Harry Morris, a board certified orthopedic surgeon specializing in upper extremities, has treated claimant's upper extremity injuries since 1997.

On December 11, 1998, claimant sustained a right wrist fracture and median nerve injury. Shortly thereafter, claimant underwent surgery with Dr. Morris for mending of the right radius fracture and decompression of the median nerve. Over the ensuing year claimant's ulnar styloid fracture was treated as well and was eventually excised in August 2000. Using the AMA *Guides*,² Dr. Morris rated claimant's wrist injury as a 20 percent impairment of the wrist, or 12 percent whole body impairment.

In February of 2001, claimant dislocated his right little finger, which was reduced and treated with range of motion therapy. Dr. Morris rated claimant's right little finger at

¹ ALJ Award (April 16, 2013) at 2.

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

23 percent to the finger, 2 percent to the hand, and 1 percent to the whole body due to range of motion.³

The subsequent injuries claimant sustained were treated conservatively until May 24, 2007, when claimant underwent surgery for a labrum tear to his right shoulder. Dr. Morris rated claimant's right shoulder injury at one percent to the whole body.

Dr. Morris ultimately arrived at an impairment rating of 15 percent to the whole body by combining the 1 percent ratings of claimant's shoulder, right thumb, and right little finger; the 12 percent rating of the right wrist; and the 0 percent ratings of claimant's left thumb and left ring finger. All medical treatment for claimant's upper extremity injuries was completed by April 2008.

Dr. Morris noted claimant's body would continue to get beaten up and his condition progress over time as claimant continued to play hockey. He suggested claimant wait to be evaluated until the end of his playing career to "see if there was anything else that needed to be done to him surgery-wise, therapy-wise, [or] treatment-wise."⁴

In November of 2008, claimant suffered an injury to his low back when he was hit during a hockey game in Tulsa, Oklahoma. Claimant reported he twisted and fell onto the ice, landing upon his right hip/low back region. Eventually claimant was given an MRI which revealed a broken L4 disc that put pressure on the sciatic nerve. On January 11, 2010, Dr. Raymond Grundmeyer performed a right lumbar L4-5 laminotomy and microdiscectomy. Claimant's preoperative and postoperative diagnoses were right lumbar L4-5 disc herniation with lumbar radiculopathy.

Dr. George Fluter, a board certified physician specializing in physical medicine and rehabilitation, examined claimant at his counsel's request on February 8, 2012. He issued an independent medical examination report the same date. Dr. Fluter testified he believed there existed a relationship between claimant's injuries and claimant's work as a hockey player. Dr. Fluter further stated that after combining and converting claimant's various impairments and considering claimant's strength impairment, claimant suffers from a combined impairment of 39 percent to the whole body. Recommendations included restriction to an occasional basis of overhead activities and restriction to an occasional basis of repetitive activities using claimant's right hand.

Dr. Fluter issued an additional report on June 1, 2012, in which he addressed claimant's lumbar condition. Dr. Fluter opined claimant had a 10 percent impairment to the body as a whole for the lumbar spine. He recommended claimant restrict bending,

³ Dr. Morris used the *AMA Guides to the Evaluation of Permanent Impairment* (5th ed.) for the rating of claimant's right little finger. (Morris Depo., Ex. 3 at 4.)

⁴ Morris Depo. at 9.

stooping, crouching, and twisting to an occasional basis. Medical expenses regarding claimant's low back injury were last paid in 2012.

PRINCIPLES OF LAW

K.S.A. 44-534(b) states:

No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

ANALYSIS

1. Upper Extremity Injuries

Respondent provided evidence of at least sixteen separate injuries to claimant's right and left upper extremities, right leg, chest, and low back during a period from December 29, 1997 through October 22, 2007. Each injury arose from participating in hockey games. Each injury was a single traumatic event. The last treatment provided for the last of these injuries, a right leg contusion occurring on October 22, 2007, was April 14, 2008. The final payment of medical compensation to Via Christi Rehab Center was made on May 9, 2008. Claimant filed an application for hearing alleging injuries to both wrists and hands, right shoulder and back on July 28, 2011.

The ALJ found that claimant was injured through a series of repetitive traumas arising out of and in the course of his employment with respondent through November 2008. This finding was based upon Dr. Morris' testimony that "claimant continued to play, his body continued to get beat up, and his injuries became progressive over time."⁵ The Board disagrees with the ALJ's conclusion.

Dr. Morris testified:

A: But each of the injuries he's had, you know, was an injury he had over time. So as you can see from this list, every year or every couple of years he has an injury.

...

A: Then we take care of that injury and then it moves on. Once that injury has been taken care of, then it pretty much is static at that point for really the majority of them. If you have a fracture that is intra-articular, that goes into the joint, then you have

⁵ ALJ Award (April 16, 2013) at3.

an increased risk of arthritis down the road, you know, if you mean something progressive that way.⁶

This testimony suggests that in each of claimant's injuries, once claimant received treatment for his many injuries, not including his low back, his condition was static. When asked if participating in practice drills would aggravate his upper extremity conditions, Dr. Morris testified:

A: With continued use, he could become more painful.

...

A: There's no doubt about that because he has some limitations of motion and maybe some decrease in strength. But, again, when you stop that, then pain should go away.

Q: So it doesn't continue any injury process, it just is increase of the pain and his symptomatology?

A: Right. Like, if he continues to play hockey, you know, when you fall on the ice and when you bang into people you are going to continue to get soreness and bruises and contusions and pain. When you stop that, they go away.⁷

The Board gives more weight to the opinions of Dr. Morris over Dr. Flutter as they relate to claimant's upper extremities. Dr. Morris had the opportunity to observe claimant over ten years, while Dr. Flutter did not examine claimant until 2012. Based upon Dr. Morris' testimony, claimant suffered from a multitude of singular traumatic events, and not a series of repetitive traumas as alleged.

K.S.A. 44-534(b) requires the Application for Hearing to be filed within 3 years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later. Claimant did not meet either of the limitation periods. Over three years had passed from the last accident date and the last date that medical treatment was last provided. Claimant's claim for compensation for injuries to his right and left upper extremities is barred by K.S.A. 44-534(b).

2. Low Back Injury

Claimant injured his low back and hip as a result of being hit and falling to the ice on November 23, 2008. The employer filed a report of accident with the Kansas Division of Workers Compensation on June 8, 2009. Jeff Lund testified that respondent provided

⁶ Morris Depo. at 10-11.

⁷ *Id.* at 14-15.

medical treatment for claimant's low back and hip injury from November 27, 2008, through June 23, 2012. A timely Application for Hearing, which included the low back injury, was filed on July 28, 2011.

The only low back rating in evidence is that of Dr. Flutter. Dr. Flutter opined that claimant suffers a 10 percent impairment of function to the body as a whole relating to his low back as a result of his November 23, 2008 injury.

Based upon the record, claimant suffers a 10 percent impairment to the low back as a result of his injury.

CONCLUSION

Claimant's bilateral upper extremity claim is barred by K.S.A. 44-534(b).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated April 16, 2013, is modified. The ALJ's findings related to claimant's upper extremities are reversed. Claimant's recovery is limited to a 10 percent low back impairment. All other orders of the ALJ are affirmed if consistent with this order.

The claimant is entitled to 41.50 weeks of permanent partial disability compensation at the rate of \$341.96 per week or \$14,191.34 for a 10 percent work disability, making a total award of \$14,191.34.

As of August 20, 2013, there would be due and owing to the claimant 41.50 weeks of permanent partial disability compensation at the rate of \$341.96 per week in the sum of \$14,191.34 for a total due and owing of \$14,191.34, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of August, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
larry@ksworkcomplaw.com
fdesk@ksworkcomplaw.com

Alexander B. Mitchell, Attorney for Respondent and its Insurance Carrier
alex@alexanderbmitchell.com

John D. Clark, Administrative Law Judge